

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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15-3125

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DOUGLAS M. BERKOWITZ,

Appellant,

v.

ROBERT A. MCDONALD,  
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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## **ISSUES PRESENTED FOR REVIEW**

- I. Where the Board failed to properly interpret the report from a VA medical examination, and relied upon another inadequate VA medical examination to deny the Veteran entitlement to a rating in excess of 20 percent for his degenerative disc disease since April 2011, was its decision not in accordance with the law?
- II. Where the Board misinterpreted 38 C.F.R. § 3.321(b)(1) (2015) when it determined that the Veteran's symptoms, such as chronic pain and limitations on standing and sitting were contemplated within the scheduler rating criteria, did it commit prejudicial legal error?

## **STATEMENT OF THE CASE**

Douglas M. Berkowitz served honorably on active duty in the United States Air Force from June 1960 to June 1980. R-2066. He received the National Defense Service Medal, the Air Force Outstanding Unit Award, and the Air Force Commendation Medal. *Id.*

In July 1980, Mr. Berkowitz applied for service connection and compensation for his low back pain. R-2064-65. That September, the Regional Office granted entitlement to service connection and compensation for degenerative disc disease at a 10 percent evaluation, effective July 1, 1980. R-588 (587-88).

In October 2005, the Veteran applied for an increased rating for his low back disability. R-2008-09. In a July 2006 statement, the Veteran reported that his back

condition was so severe that it was a chore to get out of bed and go to work. R-1933-34. A February 2007 rating decision continued the Veteran's low back disability at a 10 percent evaluation. R-1443 (1438-52).

Mr. Berkowitz filed an additional claim for entitlement to an increased rating for his low back disability in May 2008. R-1436-37. In August of that year the RO continued the 10 percent evaluation for the Veteran's degenerative disc disease. R-1291 (1289-94). Mr. Berkowitz filed a notice of disagreement in September 2008. R-1277-80. In December of that year, he stated that his back condition had an extreme detrimental effect on his daily life and employment. R-1215 (1214-18).

In January 2009, Mr. Berkowitz filed a claim for entitlement to an increased rating for his degenerative disc disease based on convalescence due to surgery. R-1209-10. That April, the Veteran was granted a temporary total evaluation for convalescence from January 7, 2009 to March 1, 2009. R-1192 (1188-95). A statement of the case issued the same month continued the Veteran's 10 percent evaluation. R-1164 (1150-65). The Veteran perfected his appeal to the Board that month. R-1148 (1146-49).

Mr. Berkowitz testified before the Board in May 2010. R-1118-27. He testified that the pain in his back was debilitating and that he could not sit, stand, or lie down. R-1121. He further stated that if he has to bend down to pick something up, he needs a physical object to hoist himself back up, because he cannot get up on his own. R-1123. In March 2011, the Board remanded the Veteran's claim for a new

examination because the Veteran asserted that his condition had increased in severity. R-1114-15 (1112-17).

The Veteran underwent a VA spine examination in April 2011. R-1046-54. He reported falling 4 or 5 times in the last few months and the examiner indicated it was difficult to say if it was due to the back or the knees. R-1046. The examiner indicated there was a history of fatigue, decreased motion, stiffness, weakness, and spasm. R-1046-47. A deferred rating decision issued in April 2012 sent the claims file back to the examiner to resolve what appeared to be conflicting medical evidence related to the Veteran's radiculopathy. R-185. An addendum opinion was provided in May 2012 which attributed moderately severe bilateral lower extremity radiculopathy to the Veteran's back condition. R-184.

A July 2012 rating decision increased the Veteran's low back disability from a 10 percent rating to a 20 percent rating effective April 2011. R-158 (149-67). In March 2014, the Veteran applied for increased compensation based on unemployability noting that his back, right knee, bilateral radiculopathy, and headaches prevented him from securing or following substantially gainful occupation. R-138-39.

The Veteran underwent additional VA examinations in August 2014. R-90-128. During the spine examination, Mr. Berkowitz was only able to flex forward to 30 degrees before evidence of painful motion began. R-92. The examiner indicated that forward motion was supported as the Veteran reported that he would fall over if he

tried to do so unassisted and the motion was not repeated more than two times. R-93-94. Mr. Berkowitz had functional limitation of less movement than normal and pain on movement. R-95. He was supported by the regular use of a cane and the occasional use of a walker. R-99. The examiner opined that the condition would impact the Veteran's ability to work by limiting heavy and moderate duty physically demanding occupations. R-104. He further stated that the Veteran could do sedentary to at least light duty based solely on the lumbar spine disability. *Id.* The examiner opined that the Veteran would be further limited by about 50 degrees during additional range of motion loss due to pain, weakness, fatigability, or incoordination, on use or during flare-ups. R-111-12.

A September 2014 BVA decision denied increased ratings for the Veteran's low back disability for any period. R-64-65 (61-85). That same month, the RO proposed a reduction of the degenerative disc disease as the Veteran's condition showed some improvement. R-34 (34-37). A January 2015 rating decision decreased the Veteran's low back disability to 10 percent effective April 2015. R-3107 (3104-10). The Veteran appealed this rating decision to the Court, and in March of that year the Court issued an Order granting a joint motion for partial remand. R-3507. The parties agreed that the Board provided inadequate reasons or bases and failed to address the August 2014 VA examination. R-3509 (3508-12).

The Board issued the decision on appeal in June 2015. R-2-25. The Board denied an increased rating for the Veteran's low back disability because "there [was]

no evidence of forward flexion of the thoracolumbar spine 30 degrees or less or favorable ankyloses of the entire thoracolumbar spine. R-5. The Board also declined to refer the Veteran's claim for extraschedular consideration as "the available schedular rating [was] adequate to rate the Veteran's [condition]." R-18. This appeal ensued.

### **SUMMARY OF THE ARGUMENT**

The Board committed prejudicial legal error when it failed to properly interpret and apply this Court's case law and also failed to properly consider favorable evidence. It further erred when it failed to ensure the duty to assist was satisfied by relying on the results of an inadequate VA medical examination which failed to properly report range of motion measurements.

The Board also erred when it misinterpreted 38 C.F.R. § 3.321(b)(1) and denied referral for extraschedular consideration. Specifically, the Board failed to consider or discuss the level of severity of the Veteran's condition and whether the assigned rating sufficiently compensated him for his condition. In accordance with the plain language of the regulation, the Board should have compared the Veteran's level of severity with his assigned ratings.

The Board's misinterpretation of the law prejudiced the Veteran and requires remand in order for the Board to correctly interpret the law, reassess the evidence, and provide adequate reasons or bases for its decision.

## STANDARD OF REVIEW

A determination regarding the degree of impairment for purposes of rating a disability is an issue of fact, which this Court reviews under the clearly erroneous standard. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996). However, the Court reviews legal errors by the Board under the *de novo* standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); see *Butts v. Brown*, 5 Vet.App. 532, 538 (1993) (*en banc*). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Butts*, 5 Vet.App. at 538. The scope of the legal obligation imposed upon VA by its duty to assist is a question of law. *Beasley v. Shinseki*, 709 F.3d 1154, 1157 (Fed. Cir. 2013). The Board should determine whether the Board's decision was not in accordance with the law, without affording deference.

## ARGUMENT

- I. The Board erred when it failed to properly interpret and apply the law, incorrectly disregarded favorable findings, and relied on an inadequate VA examination which did not comply with *Mitchell v. Shinseki*, 25 Vet.App. 32 (2011) to rate the Veteran's low back disability.**

The Board erred when it determined that a rating in excess of 20 percent for the Veteran's low back disability was not warranted. R-5. Mr. Berkowitz was afforded two examinations for his degenerative disc disease during the period on appeal. The Veteran was prejudiced when the Board failed to properly interpret the results from an August 2014 VA examination indicating the Veteran was entitled to a

higher rating due to functional loss. Additionally, as described in more detail below, the other VA examination, conducted in April 2011, failed to comply with regulations and this Court's case law when it did not adequately express the extent of the Veteran's functional loss as required.

A veteran is entitled to the assistance of VA in developing the facts pertinent to his or her claim. 38 U.S.C. § 5103A(a)(1). VA's duty to assist a veteran requires VA, *inter alia*, to obtain a medical opinion "when such an . . . opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *see Charles v. Principi*, 16 Vet.App. 370, 375 (2002) (Board erred in failing to obtain medical nexus opinion necessary to make decision on claim); 38 C.F.R. § 3.159(c)(4) (2015). The duty applies to the Board as well as the RO. *Holland v. Brown*, 6 Vet.App. 443, 448 (1994). However, VA's duty to assist a veteran in developing a claim is not necessarily discharged simply by conducting a medical examination; the examination must be adequate for adjudication purposes. *See, e.g.*, 38 C.F.R. § 4.2 (2015) ("[I]t is incumbent upon the rating board to return [a] report as inadequate for evaluation purposes [if it does not contain sufficient detail].")

Functional loss must be considered in evaluating a veteran's level of disability. *See* 38 C.F.R. § 4.40 (2015) (stating that "functional loss...may be due to pain," and "a part that becomes painful on use must be regarded as seriously disabled."); *see also* 38 C.F.R. § 4.45 (2015) (" . . . the factors of disability reside in reductions of their normal excursion of movements in different planes. Inquiry will be directed to . . . pain on

movement, swelling, deformity or atrophy of disuse.”). The Court confirmed this understanding in its decision in *DeLuca v. Brown*, 8 Vet.App. 202, 206 (1995), where it held that the disabling effect of pain on motion must be considered and reflected in the rating.

Later, in *Mitchell v. Shinseki*, 25 Vet.App. 32, 38 (2011), the Court reiterated that, in “the context of examinations evaluating functional loss in the musculoskeletal system under [diagnostic codes] based upon limitation of motion” an adequate examination must “compl[y] with the requirements of § 4.40, and the medical examiner must be asked to express an opinion on whether pain could significantly limit functional ability during flare-ups or when the arm is used repeatedly over a period of time.” *Mitchell*, 25 Vet.App. at 43-44 (*citing DeLuca*, 8 Vet. App. at 206. This Court found the medical examination in *Mitchell* to be inadequate because it made no initial finding as to the degree of ROM lost due to pain as required by *DeLuca*. *Id.* As a result of the deficient examination, it was unclear “at what point during the range of motion the appellant experienced any limitation of motion that was specifically attributable to pain.” *Id.* This specific information is important so the Board, or the VA ratings official, “can have a clear picture of the nature of the veteran’s disability and the extent to which pain is disabling.” *Id.*

The medical evidence of record contains evidence to support the assignment of a higher schedular rating. In an August 2014 examination, the examiner indicated that pain on motion during forward flexion began at 30 degrees and indicated that forward

motion was supported because the Veteran stated he would fall over if he attempted forward flexion without support. R-92, 93-94. Furthermore, the examiner stated that there was functional loss in the form of less movement than normal and pain on movement. R-95. Upon repetition or during flare-ups pain, weakness, fatigability, or incoordination would further limit the Veteran by an additional 50 degrees. R-111-12. The Board failed to discuss any of this information regarding functional loss. Pain on motion that contributed to additional functional loss, which limited the Veteran's motion to 30 degrees of forward flexion, would entitle him to a 40 percent rating under diagnostic code 5243, which provides for such a rating when flexion is limited to 30 degrees or less. *See* 38 C.F.R. § 4.71a (2015), DC 5243.

The Board erred when it failed to assign this rating. Contrary to the Board's finding, there was evidence of limitation of motion to 30 degrees or less. R-5; R-92. The Board compounded the failure to properly interpret the favorable findings when it relied upon an earlier April 2011 VA examination to deny the Veteran entitlement to an increased rating. R-13-14. That examination fails to discuss functional loss appropriately and is not adequate for rating purposes.

The April 2011 examination is inadequate because it does not express the full extent of functional loss caused by the Veteran's disability due to weakened movement, excess fatigability, incoordination or pain on use described in terms of the degree of additional range-of-motion lost on active motion or with repetitive use. *See*

38 C.F.R. § 4.40 (stating “[i]t is essential that the examination on which ratings are based adequately portray the anatomical damage, and the functional loss.”).

The Veteran was examined in April 2011. R-1046-54. The examiner noted that there was a history of fatigue, decreased motion, stiffness, weakness, spasm, and pain. R-1046-47. The Veteran was unable to walk more than a few yards and exhibited an antalgic gait. R-1047. The examiner conducted range of motion testing and reported that the Veteran’s flexion was from 0 to 80 degrees. *Id.* He noted that there was objective evidence of pain on active range of motion, but failed to make a notation of where this pain began. *Id.* This was the same problem noted in *Mitchell*. The *Mitchell* Court found the exam to be inadequate because the examiner did not provide the initial range of motion measurement for degree of range of motion lost due to pain as required by *DeLuca*. *Mitchell*, 25 Vet.App. at 43-44. The examination report did not contain enough information for the Board to make a fully informed decision regarding the impact of functional loss due to pain on motion. *See id.*

Here, the examiner noted that there was objective evidence of pain on range of motion following repetition, but then failed to provide any range of motion measurements after repetitive motion. R-1047; *see also DeLuca*, 8 Vet.App. at 206 (finding examination inadequate where the examiner did not consider “functional loss on use or due to flare-ups”). The Board did not have enough information to properly rate the Veteran’s condition from this examination report.

Thus, for the reasons described above, the only examination adequate for rating purposes is the one conducted in August 2014, where the examiner found that pain contributed to functional loss beginning at 30 degrees and the Veteran would lose an additional 50 degrees on use, which would entitle the Veteran a 40 percent rating. The Board erred by misapplying the regulation and misinterpreting the law. Its failure to follow the law and adjudicate the Veteran's case in accordance with established case law constitutes prejudicial legal error and requires remand.

**II. The Board misinterpreted 38 C.F.R. § 3.321 when it failed to properly account for the Veteran's symptomatology.**

**a. The Board misinterpreted 38 C.F.R. § 3.321(b)(1) when it failed to assess whether the Veteran's level of severity was adequately contemplated by his assigned rating.**

Mr. Berkowitz's disability is characterized by: the use of morphine for pain; inability to walk more than a few yards; the use of a cane and walker; difficulty standing after bending over; as well as difficulty with sitting, lying down, or standing for long. *See* R-1120-23. In denying referral for extraschedular consideration, the Board found that "the schedular rating in this case is adequate." R-18. The Board's failure to evaluate the level of severity of the Veteran's condition and its subsequent effects on employment was a misinterpretation of the law.

When considering referral for extraschedular consideration, the Board is required to consider not just the Veteran's symptoms, but also the severity of those symptoms. *See Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The Board is also required

to compare the Veteran's symptoms and their severity to the Veteran's assigned rating, rather than the rating schedule as a whole. *See Johnson v. McDonald*, 762 F.3d 1362, 1366 (Fed. Cir. 2014). Thus, the appropriate question for the Board to consider is whether the Veteran's symptomatology and its severity are contemplated by his assigned schedular rating. *See Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016) ("the Board first must compare the veteran's symptoms with the assigned schedular ratings").

The Board was obligated to compare and consider whether Mr. Berkowitz was adequately compensated by his 20 percent rating for the need for assistive devices, morphine tablets, and the inability to bend, sit, stand, or walk for prolonged periods. R-99; 1121-23. None of these symptoms are contemplated by the rating criteria, which provides for compensation based on limitation of motion of the back. *See* 38 C.F.R. § 4.71a (Diagnostic Code 5243). The Board's failure to discuss these symptoms was prejudicial.

Additionally, chronic pain that requires regular pain medication and morphine tablets to take the edge off of the pain is not discussed in the rating criteria. *See id.*; *see also* VA Gen. Coun. Prec. 06-96 (Aug. 16, 1996) (noting that referral for extraschedular consideration may be required where schedular evaluations contemplate range of motion limitations but evidence shows that medication required for the disability interferes with employment). Contrary to its own policy, the Board incorrectly determined that the impact of medication was contemplated by the rating

criteria assigned. The Board made no attempt to provide an adequate analysis of how it came to this conclusion. Because the Board failed to provide this analysis, its reasons or bases for denying extraschedular referral are inadequate and remand is warranted. *See Brambley v. Principi*, 17 Vet.App. 20, 23 (2003).

Moreover, the evidence of record demonstrates that there is marked interference with employment and the Veteran was prejudiced by the incorrect analysis regarding the level of severity of his condition. Had the Board conducted the proper analysis of the level of severity and considered whether the assigned rating adequately compensated the Veteran's lumbar spine disability, it would have determined that consideration of the second step of *Thun* was necessary. *See Thun*, 22 Vet.App. at 115. The Board needed to determine whether the Veteran's back disability caused marked interference with employment, which would have raised the possibility of impairment in the average earning capacity that was greater than the schedular rating assigned.

In Mr. Berkowitz's case, the record demonstrates that his symptoms negatively affect his ability to work. *See* R-104 (August 2014 examination report stating the back condition impacted the Veteran's ability to work); R-138 (March 2014 application for TDIU based on the combined impact of his back, knee, radiculopathy, and headache conditions); R-1215 (December 2008 statement from Veteran that his back condition had an extreme detrimental effect on his daily life and employment); R-1933 (July

2006 statement from Veteran that his back pain is so severe it is hard to get out of bed and go to work).

“[E]xtraschedular consideration may be warranted for disabilities that present a loss of earning capacity that is less severe than one where the veteran is totally unemployable.” *Thun*, 22 Vet.App. at 117. As noted, 38 C.F.R. “§ 3.321(b)(1) performs a gap-filling function [and] accounts for situations in which a veteran’s overall disability picture presents something less than total unemployability, but where the collective impact of the veteran’s disabilities are nonetheless inadequately represented.” *Johnson*, 762 F.3d at 1365.

Here, the Veteran’s combined disability picture affects employment in a way that exceeds the rating schedule because his problems with bending, standing, walking, sitting, and chronic pain suggest that he cannot do sedentary work, or at least cannot do the full scope of sedentary work. Had the Board adequately considered whether Mr. Berkowitz’s symptoms result in greater functional impairment than contemplated by a 20 percent rating, it may have found extraschedular referral warranted.

At minimum, the Board failed to provide adequate reasons or bases for its conclusory finding that the Veteran’s disability picture did not warrant extraschedular referral. *Johnston v. Brown*, 10 Vet.App. 80, 86 (1997). Without an adequate discussion in this regard it is difficult to ascertain the precise basis for the Board’s decision. *Bowling v. Principi*, 15 Vet.App. 1, 6-7 (2001).

**b. The Board misinterpreted 38 C.F.R. § 3.321(b)(1) when it failed to conduct a combined effects analysis regarding the Veteran's multiple service connected disabilities.**

At the time of the Board decision, the Veteran was service connected for degenerative joint disease of the right knee, chondromalacia of the right knee, degenerative disc disease, bilateral lower extremity radiculopathy, epicondylitis of the right elbow, cholecystectomy, and tension headaches. R-3104-05. Yet, the Board made no attempt to discuss or consider the combined effects of the Veteran's service connected disabilities when evaluating the need for an extraschedular referral.

The Federal Circuit, in *Johnson v. McDonald*, held that when considering the need for extraschedular referral, the Board must weigh all of a claimant's service-connected disabilities together to determine whether they combine to form an exceptional disability picture. 762 F.3d at 1365. Furthermore, recently, the Court determined that the Board must address whether referral is required on a collective basis when that issue is argued by the appellant or reasonably raised by the record. *See Yancy*, 27 Vet.App. at 495.

Here, the Board did not even address the possibility of a collective impact of the Veteran's service-connected conditions. R-18. This is a misinterpretation of the law. The Board was required to consider whether the combined effects of multiple conditions create an exceptional or unusual disability picture. Here, the combined impact was expressly raised by the Veteran.

In March 2014, the Veteran filed an application for an increased based on individual unemployability due to the combined impact of his right knee condition, low back disability, bilateral radiculopathy, and headaches. R-138. During an April 2011 VA examination the examiner indicated he could not tell whether the Veteran's reported falls were due to his knee or back condition. R-1046. Moreover, the Veteran is service connected for bilateral lower extremity radiculopathy associated with his degenerative disc disease. R-3104-05. Thus, the need for a combined impacts analysis was both expressly and reasonably raised by the record.

The Board's failure to consider the combined effects of the Veteran's service-connected disabilities was prejudicial to the Veteran. If the Board had contemplated the collective impact of the Veteran's service connected disabilities as required, it could have found that extraschedular referral was warranted. As such, the Board's misinterpretation of 38 C.F.R. § 3.321 (b)(1) prejudiced the Veteran and remand is required for proper adjudication based on the collective impact of the Veteran's service-connected conditions.

## **CONCLUSION**

The Board committed prejudicial legal error when it failed to properly interpret and apply the results from a VA medical examination and when it failed to ensure that the duty to assist was satisfied by relying on an inadequate VA medical examination which failed to properly measure range of motion. Additionally, the Board erred when it did not adequately consider the severity of the Veteran's symptomatology

when determining whether referral for extraschedular consideration was warranted.

The Board's errors prejudiced the Veteran and remand is required in order for the Board to readjudicate the Veteran's claim under a correct interpretation of the law, reassess the evidence, and provide adequate reasons or bases for its decision.

Respectfully submitted,  
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